

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND**

STEWARD HEALTH CARE SYSTEM LLC, et al.)

Plaintiffs)

v.)

BLUE CROSS & BLUE SHIELD OF
RHODE ISLAND,)

Defendant)

Case No. 1:13-cv-405

EXPEDITED RELIEF

REQUESTED (LR Cv 9)

MOTION TO COMPEL PRODUCTION OF CLAWED-BACK DOCUMENTS

Pursuant to Rule 37 of the Federal Rules of Civil Procedure and the Consent Order Governing Electronically-Stored Information and the Treatment of Confidential Information (the “Consent Order,” Doc. 42), Defendant Blue Cross & Blue Shield of Rhode Island (“BCBSRI”) moves to compel production of at least thirteen documents that Plaintiff Steward Health Care System, LLC (“Steward”) seeks to claw back under the Consent Order, but which BCBSRI asserts are not privileged or otherwise protected from discovery.¹ In addition, BCBSRI moves to compel the production of the hundreds (if not thousands) of additional non-privileged documents Steward has withheld from its production on the same grounds as those Steward now attempts to claw back.

BCBSRI seeks expedited relief on each of these two issues because depositions of the Steward witnesses impacted by these inappropriately withheld documents are ongoing and

¹ Pursuant to the Consent Order, “[i]f information subject to a claim of attorney-client privilege or work product protection . . . is inadvertently disclosed or produced by the Producing Party,” the Producing Party may claw back the inadvertently produced document. Consent Order at Section VI, ¶ 12(b). However, “the return of Discovery Material to the inadvertently Producing Party shall not in any way preclude the Receiving Party from moving the court for a ruling that the Discovery Material was never privileged.” *Id.* at ¶ 12(d).

proceeding quickly in this matter. While BCBSRI is trying to move forward with those depositions in order to comply with the Court's revised scheduling order, Steward's persistent refusal to produce highly relevant, non-privileged documents has jeopardized BCBSRI's ability to obtain the discovery required to defend itself from Steward's lawsuit. For example, as discussed below, [REDACTED]

[REDACTED] negotiations that have nothing to do with BCBSRI. In other words, Steward continues to use false claims of privilege to withhold from BCBSRI and the Court the very evidence that disproves Steward's claims that BCBSRI caused the Landmark purchase to fail. The Court should order Steward to produce these documents immediately so that BCBSRI and the Court are not deprived of the evidence that disproves Steward's claims.

I. The Court Should Order Steward To Produce Thirteen Non-Privileged Documents Steward Seeks To Claw Back

The attorney-client privilege "protects only those communications that are confidential and are made for the purpose of seeking or receiving legal advice." *In re Keeper of Records (Grand Jury Subpoena Addressed to XYZ Corp.)*, 348 F.3d 16, 22 (1st Cir. 2003). Just because an attorney appears on an email chain does not mean that the email is privileged and immune from discovery. *See Wachtel v. Health Net, Inc.*, 482 F.3d 225, 231 (3d Cir. 2007) ("Where a lawyer provides non-legal business advice, the communication is not privileged."); *Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 884 (1st Cir. 1995) ("The attorney-client privilege attaches only when the attorney acts in that capacity."); *United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1076 (N.D. Cal. 2002) (holding that the attorney-client privilege does not protect attorney's business advice); *Borase v. M/A COM, Inc.*, 171

F.R.D. 10, 14 (D. Mass. 1997) (same). Steward has the burden to establish that the documents it now attempts to claw back are protected by the attorney-client privilege. *Vicor Corp. v. Vigilant Ins. Co.*, 674 F.3d 1, 17 (1st Cir. 2012).

Both BCBSRI and Steward have clawed back documents pursuant to the Consent Order. However, it was not until recently that BCBSRI discovered that Steward was using the claw-back provision inappropriately in order to deprive BCBSRI of *non-privileged* documents that are highly relevant to the claims and defenses in this lawsuit. For example, on October 26, counsel for Steward sent counsel for BCBSRI a letter seeking to claw back seventeen documents pursuant to the Consent Order. *See* Oct. 26, 2016, letter from J. Weingarten to J. Bernick (Exhibit A). At least thirteen of those documents are not privileged or otherwise protected from discovery, including the following: STEWARD00562565, STEWARD00588791, STEWARD00589032, STEWARD00589422, STEWARD00592035, STEWARD00592477, STEWARD00592715, STEWARD00593916, STEWARD00008556, STEWARD00072725, and STEWARD00089188 (the “Steward Documents”). In addition, while none of the documents are privileged, it is noteworthy that eight of those documents are iterations of a single email chain that was originally redacted, meaning that Steward reviewed the document at least *eight times* and nevertheless deliberately chose to produce the document in redacted form. There is therefore nothing “inadvertent” about Steward’s disclosure of these documents that would permit Steward to take advantage of the claw-back provision in the Consent Order.

Consistent with its obligations under the Consent Order, BCBSRI has destroyed its copies of the Steward Documents. While Rule 26 would permit BCBSRI to attach these documents to this motion under seal for a determination of Steward’s privilege claim, Fed. R. Civ. P. 26(b)(5)(B), the Consent Order has modified the default rule such that BCBSRI may not

discuss the specifics of these thirteen documents in this motion, or attach those thirteen documents to this motion. Consent Order at Section VI, ¶ 12(b). Therefore, BCBSRI respectfully requests that the Court (1) direct Steward to provide the thirteen Steward Documents to the Court for an *in camera* review with all previously made redactions removed within two business days; (2) rule that the Steward Documents are not privileged; and (3) order Steward to immediately produce the Steward Documents.

BCBSRI requests this relief on an expedited basis because BCBSRI intended to use the Steward Documents at one or more depositions of Steward witnesses that are scheduled for *next week* on November 7, 9, and 10, and thereafter in the last two weeks of November and in December. BCBSRI must have the opportunity to test those witnesses' knowledge of the documents that Steward has inappropriately clawed back. Although counsel for Steward has indicated that it merely intends to redact (rather than withhold) certain of the Steward Documents, it is BCBSRI's position that the documents are neither privileged in whole nor in part, and therefore there is no reason to wait for Steward's privilege log or redacted versions before the Court rules on BCBSRI's motion. Doing so would deprive BCBSRI of the ability to use the documents at the upcoming depositions. The need for expedited relief is particularly acute because Steward has attempted to use the claw-back process to withhold non-privileged documents from the Court and from BCBSRI that show that Steward's claims are baseless, discussed below.

II. The Court Should Order Steward To Produce All Joseph Maher Communications That Have Been Inappropriately Withheld

Steward has withheld thousands of documents simply because they involve communications including Joseph Maher, Steward's General Counsel. Steward has withheld these documents regardless of whether Mr. Maher was communicating with Steward employees,

or with numerous other third parties with divergent interests from Steward, such as the Special Master and Joshua Nemzoff, a consultant employed by the Special Master.² However, the law is clear that the mere *presence* of an attorney on an email does not somehow immunize the email from discovery. Indeed, the attorney client privilege only protects such documents from disclosure where the lawyer is acting in a legal – rather than business – capacity. *See, e.g., Texaco Puerto Rico, Inc.*, 60 F.3d at 884 (“The attorney-client privilege attaches only when the attorney acts in that capacity.”); *Borase*, 171 F.R.D. at 14 (the attorney-client privilege does not protect attorney’s business advice). This is particularly true with respect to in-house attorneys such as Mr. Maher, who routinely provide input on *business* issues rather than *legal* issues. Indeed, the record is clear that Mr. Maher was one of the central figures involved in *business* decisions regarding the terms of the Landmark purchase and whether to move forward with that purchase. Withholding emails merely because Mr. Maher is included on those emails therefore deprives BCBSRI of the vast bulk of the documents discussing the Landmark deal – documents of utmost importance to this case. Steward’s assertions of privilege are wrong as a matter of law and highly prejudicial to BCBSRI.

BCBSRI has worked diligently to segregate the documents in which its own in-house lawyers have acted in a business (rather than legal) capacity. In contrast, Steward has used false claims of privilege to withhold from the Court and BCBSRI documents in which Mr. Maher is acting in a business capacity. The fundamental problem is that BCBSRI generally lacks the

² This motion does not implicate the related question currently pending before the Court as to whether the common-interest doctrine applies. *Cf.* BCBSRI’s Objections to the Memorandum and Order Denying Its Motion to Compel (Doc. 128); Reply Memorandum of Law in Further Support of its Objections to the Memorandum and Order Denying Its Motion to Compel (Doc. 135). Rather, the documents subject to this motion are not privileged in the first instance and therefore cannot be withheld under any theory. *Cavallaro v. United States*, 284 F.3d 236, 250 (1st Cir. 2002) (noting that the common-interest doctrine is not an independent privilege).

means to challenge these false claims of privilege because the documents themselves have been withheld and Steward's privilege log does not describe the documents with sufficient particularity to enable BCBSRI to determine whether documents truly relate to business rather than legal issues. However, on October 25, 2016, Steward attempted to claw back such a document that [REDACTED]

[REDACTED] The document simply is not privileged. Indeed,

Mr. Nemzoff produced a version of the [REDACTED] and subsequently stated that he was not asserting any privilege as to the documents he produced.

[REDACTED] the category of documents that go to the heart of Steward's claims and BCBSRI's defenses in the case. Like hundreds – if not thousands – of documents Steward has inappropriately withheld from discovery in this case, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] to conceal from BCBSRI and the Court the *true* reasons why Steward failed to purchase Landmark – the very evidence in this case that disproves their claims.

BCBSRI informed Steward that it intended to move to compel production of the [REDACTED] [REDACTED] because the document is highly relevant and not privileged. At the required meet and confer, counsel for Steward doubled down on its false privilege claim, [REDACTED] [REDACTED] was privileged on the same basis as all of the other communications between Mr. Maher and third-parties that Steward had previously withheld. *See* Declaration of Justin Bernick (Exhibit C). Nevertheless, after several hours passed, counsel for Steward indicated via email that it would withdraw its demand to claw back the document. Regardless of the underlying merits of its privilege claim, Steward has now scrutinized the [REDACTED] extensively and made the deliberate decision not to assert that the document is privileged. Because Steward has appropriately conceded that the attorney-client privilege does not shelter Mr. Maher's

communications related to business issues involving the proposed Landmark purchase, the Court should order Steward to produce all of Mr. Maher's communications that were previously and inappropriately withheld on this basis within five days. This is particularly true since counsel for Steward expressly stated that all such documents were previously withheld on the same basis, calling into serious question the propriety of *all* of Steward's hundreds (if not thousands) of privilege determinations with respect to Mr. Maher.³ Again, BCBSRI requests expedited relief because Steward's apparent abuse of the discovery process is negatively impacting BCBSRI's ability to depose Steward witnesses, including depositions that are scheduled as early as next week.

CONCLUSION

For the foregoing reasons, BCBSRI respectfully requests that the Court (1) direct Steward to provide the thirteen Steward Documents to the Court for an *in camera* review with all previously made redactions removed within two business days; (2) rule that the Steward Documents are not privileged; (3) order Steward to immediately produce the Steward Documents; and (4) produce all Mr. Maher communications that were previously and inappropriately withheld within five days. BCBSRI requests expedited relief due to the deposition schedule of Steward witnesses described above.

³ Although such documents are not privileged in the first place, Steward's decision to produce the [REDACTED] waived any privilege over Mr. Maher communications related to business issues involving the proposed Landmark purchase. "[A] waiver resulting from a disclosure of protected information in a federal proceeding extends to undisclosed protected material 'only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together.'" *U.S. Airline Pilot Ass'n v. Pension Benefit Guar. Corp.*, 274 F.R.D. 28, 31 (D.D.C. 2011) (quoting Fed. R. Evid. 502(a)). Steward's disclosure of the [REDACTED] is intentional; the withheld communications all concern the same subject matter (i.e., business issues involving the proposed Landmark purchase); and it would be a fundamental miscarriage of justice to permit Steward to selectively maintain hundreds (if not thousands) of false privilege claims in order to conceal the evidence that disproves Steward's claims from the Court and BCBSRI.

RULE 37 CERTIFICATION

I hereby certify that, prior to bringing this Motion to Compel, counsel for BCBSRI conferred in good faith with counsel for Steward in an unsuccessful effort to secure the information without the necessity of court action.

/s/ Patricia K. Rocha

DATED: November 1, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2016, I filed the within Blue Cross & Blue Shield of Rhode Island's Motion through the ECF system and that notice will be sent electronically to the below listed counsel who are registered participants identified on the mailing information for Case No. 13-405-S.

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